LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 1 1970
JOHN F. DAVIS, CLERK

in the Supreme Court of the United States

No. [redacted] 209

RONALD E. KAY,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

JOSEPH GASSEN,
Attorney for the Petitioner,
Ronald E. Kay
Jepeway, Gassen & Jepeway
619 Dade Federal Building
101 E. Flagler Street
Miami, Florida 33131
and
Honorable M. Daniel Futch, Jr.,
Florida Bar Counsel
Broward County Courthouse
Room 354
Fort Lauderdale, Florida 33301

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Disciplinary Rule Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	12
Certificate of Service	13
Appendix A — Opinion below Judgment of the Supreme Court of Florida	App. 1
B — Petition for Rehearing Denial of Petition for Rehearing	App. 9
C — Motion to Stay Proceedings Granting of Motion to Stay	App. 11
D — Disciplinary Rule Involved	App. 13

CITATIONS

Case	Page
Bartos v. United States District Court, 19 F.2d 722, 724 (8th Cir. 1927)	7
Britt v. Superior Court, 374 P.2d 817 (1962)	10
Cohen v. Hurley, 366 U.S. 117, 131-150, 81 S.Ct. 954, 963-972, 6 L.Ed.2d 156, 166-177 (1961)	6
Ex Parte Garland, 4 Wall. 333, 379, 18 L.Ed. 366	6
Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed.2d 510 (1965)	10
In re Garstuch, 75 N.W.2d 644, 648 (1956)	6
In re Dampier, 46 Idaho 195, 267 P. 452 (1928)	7
In re H..... T....., 2 Pennyp. (Pa.) 84 (1882)	7
In re Rothrock, 16 Cal.2d 449, 455, 109 P.2d 907, 910, 131 A.L.R. 226 (1940)	7
Katz v. U. S., 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967)	11
Morrison v. State Board of Education, 87 Cal. Reptr. 175, 461 P.2d 375 (1969)	8
Norton v. Macy, 417 F.2d 1161, 1165, (D.C. Cir. 1969)	7
People ex rel. Black v. Smith, 290 Ill. 241, 124 N.E. 807, 808, 9 A.L.R. 183 (1919)	7

CITATIONS (cont.)

Case	Page
People v. Palmer, 61 Ill., 255 (1871)	6
Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239, 77 S.Ct. 752, 755-756, 1 L.Ed.2d 796, 801-802 (1957)	6
Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967)	6
Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, (1969)	10
State v. Brown, 111 So.2d 688 (1959)	11
State v. Byrkett, 4 Ohio S. & C.P. Dec. 89 (1895)	7
State v. McClaugherty, 33 W.Va. 250, 10 S.E. 407, 410 (1889)	7
The Florida Bar v. King, 174 So.2d 398 (1965)	11
The Florida Bar v. Ruskin, 126 So.2d 142 (1961)	11
The Florida Bar v. Silverman, 196 So.2d 442 (1967)	11
Waller v. Florida, 38 U.S.L.W. 4263	12
West Virginia State Board v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943)	10
Wieman v. Updegraff, 344 U.S. 183, at 191, 73 S.Ct. 215, 97 L.Ed. 216 (1952)	8
Yakov v. Board of Medical Examiners, 68 Cal.2d 67, 64 Cal. Rptr. 785, 435 P.2d 553, (1968)	12

CITATIONS (cont.)

RULES

	Page
Integration Rule of Florida Bar, Article XI, Rule 11.02(3)(a)	2, 3, App. 13

STATUTES

28 U.S.C. §1257(3)	2

in the
Supreme Court
of the
United States

No. _____

RONALD E. KAY,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Florida

---

Petitioner, Ronald E. Kay, a member of the Bar of The State of Florida, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above case on February 11, 1970.

OPINION BELOW

The opinion of the court below (Appendix A) is reported at 232 So.2d 378.

JURISDICTION

The Judgment of the Supreme Court of Florida was filed on February 11, 1970. (Appendix A) A timely Petition for Rehearing filed on February 23, 1970, and was denied on March 30, 1970. (Appendix B) A timely Motion to Stay filed on February 23, 1970 was granted on March 30, 1970 and proceedings in the Supreme Court of Florida were stayed to and including May 29, 1970. (Appendix C) The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1.

Whether the disbarment of an attorney, predicated upon a single, isolated act of homosexuality, entirely unrelated to the practice of law, is a denial of due process of law.

2.

Whether Rule 11.02(3)(a) of Article XI of the Integration Rule of the Florida Bar is void for vagueness and is impermissibly overbroad in violation of due process of law and unconstitutionally invades the right of privacy.

3.

Whether disbarment of an attorney, predicated upon a single, isolated act of homosexuality, entirely unrelated to the practice of law, is too severe a penalty.

DISCIPLINARY RULE INVOLVED

The disciplinary rule involved is Rule 11.02(3)(a) of Article XI of the Integration Rule of the Florida Bar. (Appendix D)"

STATEMENT

On December 1, 1966, Officer Gerald Wilson of the Fort Lauderdale, Florida, Police Department, went to Stranahan Park, in Fort Lauderdale, Florida, and gained entry to a locked supply room, which led to an area between the ladies' room and the men's room. From this concealed vantage point, Officer Wilson could peer through a ventilator which was located in the men's room, and there, in the secrecy of his hideaway, could and did observe the activities in the men's rest room.

Officer Wilson testified that John Mathew McGrath was seated on the commode which is located in the men's rest room. Testimony reflects that there are two commodes in this men's rest room, separated by a solid partition with no doors on the commode stalls. Mr. McGrath was seated on the commode closest to the west wall of the building where a window was located. It was Officer Wilson's testimony that he could look over the partition between the two commodes and could see the activities in the west commode area. It was his testimony that he saw the petitioner, Ronald E. Kay, come to the rest room, urinate at the urinals, which were located on the east wall, and that after other persons in the rest room had left, he went to McGrath, and, with only he and McGrath in the room, that he saw an act of homosexuality between Kay and McGrath. He further testified that the peti-

tioner was watching out the window. (By looking out the window any person approaching the door of the men's room could be observed.) During this time no other person came into the rest room. (Officer Wilson, upon observing this, came out of hiding, came around to the men's room and arrested both McGrath and the petitioner.)

The petitioner denied the act.

The petitioner was convicted on May 4, 1967 in the Municipal Court of the City of Fort Lauderdale, Florida, of indecent exposure in violation of the Code of Ordinances of the City of Fort Lauderdale, Florida. The matter was also in court on two other subsequent occasions. The additional proceedings were necessitated by reason of a lie detector test which the petitioner had taken, which proved him to be innocent of the charge. The lie detector test was not used in evidence, although it was discussed quite extensively. The court expressly stated that it had to disregard the lie detector test because the prosecution would not stipulate to its admission.

A motion for a new trial was filed by the petitioner, and the motion was denied. Petitioner appealed to the Circuit Court, which affirmed the Municipal Court. A further appeal was taken to the Fourth District Court of Appeal. On November 4, 1968, the District Court affirmed the Circuit Court. **Ronald E. Kay v. City of Fort Lauderdale,** 215 So.2d 49. (4th D.C.A. Fla.)

These proceedings were commenced by the filing of a complaint against the petitioner, Ronald E. Kay, a member of the Florida Bar. The Grievance Committee found probable cause for referral to the Board of Governors of

the Florida Bar. Thereafter, Bar counsel and a Referee were appointed. It was stipulated that the Municipal Court record would be the testimony at the hearing before the Referee. The Referee recommended permanent disbarment, and the Board of Governors modified the recommendation to disbarment. At the proceeding before the Referee, and in the petitioner's statement in opposition to the findings and recommendations of the Referee, the petitioner raised the federal questions of deprivation of his right to practice law without due process of law and that the punishment was much too severe. In petitioner's petition for review (appeal) in the Florida Supreme Court, and in his brief in the Florida Supreme Court, he also raised the federal questions of the deprivation of his right to practice law without due process of law, and the severity of the penalty imposed.

The Supreme Court of Florida affirmed the Board of Governors of the Florida Bar in a judgment filed on February 11, 1970. A timely petition for rehearing was filed by petitioner on February 23, 1970, and was denied on March 30, 1970. A timely motion to stay was filed on February 23, 1970, and it was granted on March 30, 1970. Pursuant to the order of March 30, 1970, proceedings in the Supreme Court of Florida were stayed to and including May 29, 1970.

REASONS FOR GRANTING THE WRIT

1. The Florida Supreme Court's decision below denies the petitioner, Ronald E. Kay, of his right to practice law, without due process of law and is in direct conflict with the decisions of this court.

Mr. Justice Black's dissenting opinion in **Cohen v. Hurley,** 366 U.S. 117, 131-150, 81 S.Ct. 954, 963, 972, 6 L.Ed. 2d 156, 166-177 (1961), subsequently adopted by the majority in **Spevack v. Klein,** 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) states quite emphatically that the practice of law is a means of earning a livelihood which has not been conferred upon an attorney as a gift from the state; neither can the state destroy the right to practice law whenever it can assert a 'reasonable' justification for doing so. "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment." **Schware v. Board of Bar Examiners,** 353 U.S. 232, 238, 239, 77 S.Ct. 752, 755-756, 1 L.Ed.2d 796, 801-802 (1957). "Regardless of how the state's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the state's grace. **Ex Parte Garland,** 4 Wall. 333, 379, 18 L.Ed. 366." **Schware v. Board of Bar Examiners,** supra, fn. 5, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, 801.

The "valid reason" that will justify disbarment exists only when an attorney's actions are such that he has demonstrated an unfitness to practice law or that his actions adversely affect the proper administration of justice. **In re Garsuch,** 75 N.W.2d 644, 648 (1956). Any disbarment for an act unrelated to the practice of Law is arbitrary and capricious, and a violation of due process of Law. Many years ago, it was recognized that the Court is not a censor of morals, and it is not required to pronounce upon the style of manner and conversation which becomes an honorable member of the legal profession. **People v. Palmer,** 61 Ill. 255. (1871)

The Court has no regulatory power over the private life of members of the Bar, and it cannot exclude them from practice for private acts unless they are such as to clearly demonstrate their unfitness to practice. **Bartos v. United States District Court**, 19 F.2d 722, 724 (8th Cir. 1927). See also **In re Rothrock**, 16 Cal.2d 449, 455, 109 P.2d 907, 910, 131 A.L.R. 226 (1940); **In re Dampier**, 46 Idaho 195, 267 P. 452 (1928); **People ex rel. Black v. Smith**, 290 Ill. 241, 124 N.E. 807, 808, 9 A.L.R. 183 (1919). **Re: Washington**, 82 Kan. 829, 109 P. 700 (1911); **State v. McClaugherty**, 33 W.Va. 250, 10 S.E. 407, 410 (1889).

Accordingly, it has been held that the fact that an attorney frequented a disorderly house was not grounds for disbarment, **People ex rel. Black v. Smith**, supra; nor was an attorney's seduction of his stenographer grounds to warrant disbarment, **State v. Byrkett**, 4 Ohio S. & C.P. Dec. 89 (1895); **In re H T**, 2 Pennyp. (Pa.) 84 (1882), the Court said in dictum that fornication was not an offense justifying disbarment.

Even in occupations which one does not have the right to engage in, there must be a rational connection between the acts complained of and the effect upon the service rendered. Thus, in **Norton v. Macy**, 417 F.2d 1161, 1165, (D.C. Cir. 1969), the Circuit Court of Appeals for the District of Columbia ordered reinstated a NASA employee who had been dismissed because he had committed homosexual acts. There was simply no showing that the homosexual acts had any deleterious effects upon the employee's performance of his duties. Therefore, the dismissal was arbitrary and capricious and a violation of due process.

The Bar's constitutional limits on its power to dismiss its members may be greater where, as here, the dismissal imposes a badge of infamy. (**Wieman v. Updegraff,** 344 U.S. 183; at 191, 73 S.Ct. 215, 97 L.Ed. 216 (1952). The Due Process Clause may also cut deeper into the Government's discretion where a dismissal involves an intrusion into the ill-defined area of privacy, **Norton v. Macy,** supra, at p. 1164. In **Morrison v. State Board of Education,** 87 Cal. Rptr. 175, 461 P.2d 375 (1969) the California Supreme Court reversed the California Board of Education, which had dismissed a teacher because of his homosexual acts. Again, the Court pointed out that there was simply no connection with the homosexual acts and the teacher's discharging his duties.

In the present case, the Florida Supreme Court **admits** that there is no connection between petitioner's act and the practice of law. Chief Justice Ervin, concurring, states at p. 380:

> "The present record contains no evidence—scientific, medical, pathological or otherwise—suggesting homosexual behavior among consenting adults is so indicative of other character baseness as to warrant a condemnation per se of a participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of the Bar. Consequently, the present case leaves this issue unresolved by appropriate findings based on competent evidence."

2. Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide

against which conduct can be uniformly judged by courts and administrative agencies. **Morrison v. State Board of Education,** supra.

It would be difficult to find a statute, or administrative regulation which is as unclear, or which grants the regulatory body (in this instance, the Bar) greater latitude and fewer standards, in regulating every facet of the private lives of those subject to it, than Rule 11.02(3)(a) of Article XI of the Integration Rule of The Florida Bar. (Appendix D). What is an "act contrary to . . . good morals?" The Rule gives no indication whatsoever of the conduct that is prohibited. The Florida Bar has neither the expertise nor the requisite annointment to make or enforce absolute moral judgments. **Norton v. Macy**, supra, pg. 1165. Its standard of what constitutes an "act contrary to . . . good morals" is no more than the prevailing mores of our society, **Norton v. Macy,** supra, pg. 1165. Indeed, an act that is considered "contrary to . . . good morals" in one part of the State might very easily be perfectly acceptable in another part of the State. Is an attorney's right to practice law dependant upon where he lives?

Given the latitude which Rule 11.02(3)(a) of Article XI of the Integration Rule of the Florida Bar, acts "contrary to . . . good morals" cover a multitude of sins. Indeed, it may be doubted whether there are in the entire Florida Bar many persons so saintly as never to have done any act which is disapproved by the prevailing mores of our society. **Norton v. Macy,** supra, p. 1165. This is especially true when the fact that the most widely accepted study of American sexual practices, The Kinsey Report,

estimates that at least thirty-seven per cent of the American male population have had at least one homosexual experience during their lifetime is taken into account. **Norton v. Macy**, supra, p. 1167, f.n. 28. The notion that it would be an appropriate function of the Florida Bar to enforce the majority's conventional codes of conduct in the private lives of its members is at war with elementary concepts of liberty, privacy and diversity. **Norton v. Macy**, supra, p. 1165. "If there is any fixed star in our constitutional constellation, it is that no official, high or petit, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein." **Schware v. Board of Bar Examiners**, supra, 353 U.S. 232, 244-245, fn. 15, 77 S.Ct. 752, 1 L.Ed.2d 796, quoting **West Virginia State Board v. Barnette**, 319 U.W. 624, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943).

By its obvious overbroadness, Rule 11.02(3)(a) of Article XI of the Integration Rule of the Florida Bar enables the Bar unconstitutionally to interfere with an attorney's right to privacy. What an attorney does with his private life, as long as it does not affect the Bench, the Bar, his clients or the public, is no one's business but his. Neither the state, nor the Bar has any right to inquire into his private life. **Griswold v. Connecticut**, 381 U.S. 479, 14 L.Ed.2d 510 (1965). **Stanley v. Georgia**, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, (1969).

Should it be contended that petitioner's act was not a private one **Britt v. Superior Court**, 374 P.2d 817 (1962) provides the answer. In **Britt**, the California Supreme Court stated:

> "Man's constitutionally protected right of personal privacy not only abides with him while he is in the household or while in his own castle but cloaks him when as a member of the public he is temporarily occupying a room—including a toilet stall to the extent that it is offered to the public for private, however transient, use."

Recently, this court stated in **Katz v. U. S.**, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), that the Fourth Amendment protects people, not places. What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

3. The purpose of disciplinary proceedings is to protect the public against unprofessional, improper and unauthorized practice of law and unprofessional conduct of members of the Bar. **In re Dampier,** supra, p. 453. And, even the Florida Bar recognizes that: " . . . disbarment is the most extreme penalty which can be imposed upon an errant member of the legal profession." Furthermore, punishment should not be a penalty of retribution. **The Florida Bar v. Ruskin,** 126 So.2d 142 (1961). In numerous cases, in which an attorney has been found guilty of most egregious conduct, directly related to the practice of law, the Bar has recommended lighter penalties than disbarment, or no penalty at all. See **The Florida Bar v. Silverman,** 196 So.2d 442 (1967); **State v. Brown,** 111 So.2d 688 (1959); **The Florida Bar v. King,** 174 So.2d 398 (1965).

Moreover, if the Bar feels that petitioner's acts are of such a heinous nature, it should institute penal proceedings against petitioner. The only way in which the Bar can seek to achieve a legitimate punitive purpose is

through a penal prosecution. **Yakov v. Board of Medical Examiners**, 68 Cal.2d 67, 64 Cal.Rptr. 784. 435 P.2d 553, (1968). And, this has already been done in the Municipal Court of Fort Lauderdale, Florida. Accordingly, under the decision handed down several weeks ago by this Court, **Waller v. Florida**, 38 U.S.L.W. 4263, The State of Florida, in all its instrumentalities, including The Florida Bar, is barred from any other punitive action against the Petitioner.

CONCLUSION

Accordingly, we respectfully submit that the decision and opinion of the Supreme Court of Florida through which the Petitioner, Ronald E. Kay, was ordered disbarred be reversed and set aside.

Respectfully submitted,

JOSEPH GASSEN,
Attorney for the Petitioner,
Ronald E. Kay

Of Counsel for Petitioner, Ronald E. Kay
JEPEWAY, GASSEN & JEPEWAY
619 Dade Federal Building
101 East Flagler Street
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a copy (counterpart) of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida in these proceedings to

Honorable Earl Faircloth
Attention Honorable George R. Georgieff
Assistant Attorney General
The Capitol Building
Tallahassee, Florida

Honorable M. Daniel Futch, Jr.
Florida Bar Counsel
Broward County Courthouse
Fort Lauderdale, Florida

Honorable Marshall R. Cassedy
Executive Director of The Florida Bar
Office of the Executive Director
Supreme Court Bldg.
Tallahassee, Florida 32304

Honorable Richard C. McFarlain
Assistant Staff Counsel
Office of the Executive Director
Supreme Court Bldg.
Tallahassee, Florida 32304

on this the 26 day of May, 1970.

Joseph Gassen

JOSEPH GASSEN,
Attorney for the Petitioner,
Ronald E. Kay
619 Dade Federal Building
101 East Flagler Street
Miami, Florida 33131

APPENDIX A

THE FLORIDA BAR, Complainant,

v.

Ronald E. KAY, Respondent.

No. 38694.

Supreme Court of Florida.

Feb. 11, 1970.

Rehearing Denied March 30, 1970.

Proceeding by the Florida Bar against an attorney. The Supreme Court held that an attorney who is convicted of indecent exposure in violation of city ordinance and who exhibits a lack of candor in his testimony at the criminal and disciplinary hearings, will be disbarred and ordered to pay the cost of the proceeding.

Order in accordance with opinion

Attorney and Client Key 58

An attorney who is convicted of indecent exposure in violation of city ordinance and who exhibits a lack of candor in his testimony at the criminal and disciplinary hearings, will be disbarred and ordered to pay the cost of the proceeding. 32 F.S.A. Integration Rules of The Florida Bar, art. 11, rule 11.02(3).

M. Daniel Futch, Jr., Fort Lauderdale, for The Florida Bar, complainant.

Louis M. Jepeway, Jr., of Jepeway, Gassen & Jepeway, Miami, for respondent.

PER CURIAM.

We have received the following judgment of the Board of Governors of The Florida Bar which is predicated upon a violation of Integration Rule, Art. XI, Rule 11.02(3), 32 F.S.A.:

"JUDGMENT

"This cause came on for review and consideration by the Board of Governors of The Florida Bar upon the report of the referee and the record of proceedings before him.

"The referee found that on December 1, 1966, respondent was a party to a homosexual act with a consenting adult male in the public lavatory of Stranahan Park, Fort Lauderdale, Florida. This activity was observed by a police officer. As a result of this observation, respondent was charged with indecent exposure in the Fort Lauderdale Municipal Court, said charge being a violation of the Code of Ordinances of the city. A finding of guilty was subsequently entered. An appeal was taken by respondent to the Circuit Court which affirmed the municipal court. A further appeal was taken to the Fourth District Court of Appeal. On November 4, 1968, the Fourth District Court of Appeal affirmed the circuit court. Kay v. City of Fort Lauderdale, 215 So.2d 49 (4th D.C.A.Fla.1968).

"In addition to respondent's homosexual activity, the referee found a lack of candor and serious conflicts in respondent's testimony at the criminal and disciplinary hearings.

"It was the opinion of the referee that respondent's conduct was blatantly contrary to good morals and a proper subject for disciplinary action. The referee recommended that respondent be found guilty of misconduct justifying disciplinary measures and that he be permanently disbarred.

"The Board of Governors of The Florida Bar concurs with the referee's findings of fact and finds respondent guilty of conduct justifying disciplinary measures but modifies the recommendation of discipline. Therefore it is,

"ORDERED AND ADJUDGED that Ronald E. Kay be found guilty of conduct contrary to good morals and that he be disbarred from the practice of law in Florida. It is further ordered that he pay the cost of these proceedings in the amount of $696.11.

"DONE AND ORDERED this 26th day of May, 1969."

We have carefully considered the oral arguments presented before this Court as well as the briefs and record arising out of this cause. We conclude that there is no reason to disturb the judgment of the Board of Governors, which is hereby confirmed. The respondent Ron-

ald E. Kay is hereby disbarred from the practice of law in this State and the costs of this proceeding in the amount of $696.11 are hereby taxed against him.

It is so ordered.

DREW and CARLTON, JJ., SPECTOR, District Judge, and VANN, Circuit Judge, concur.

ERVIN, C. J., concurs specially.

ERVIN, Chief Justice (specially concurring).

This Court having adopted the view that The Florida Bar has authority to regulate and discipline the morals of members of The Florida Bar (The Florida Bar vs. Hefty, Fla., 213 So.2d 422). I concur in the judgment rendered in this case. My remarks hereinafter are expressed primarily on assumption the Respondent will seek reinstatement inasmuch as The Bar indicates no permanent disbarment is intended, but apparently only an initial condemnation of Respondent's antisocial act.

While Respondent's act definitely affronts public conventions, I am concerned as to the extent of the authority of the Board of Governors of The Florida Bar under controlling concepts of due process to continue the discipline of Respondent since there is no showing in the record of a substantial nexus between his antisocial act, or its notoriety, or place of commission, and a manifest permanent inability on Respondent's part to live up to the professional responsibility and conduct required of an attorney. Compare such cases as People v. Palmer, 61 Ill. 255; In Re Washington, 82 Kan. 829, 109 P. 700; People ex rel. Black

v. Smith, 290 Ill. 241, 124 N.E. 807, 9 A.L.R. 183; State v. Byrkelt, 4 Ohio S. & C.P. Dec. 89; In Re: H____ T_____, 2 Pennyp. (Pa.) 84; Norton v. Macy, 417 F.2d 1161, U. S. Court of Appeals for the District of Columbia Circuit (July 1, 1969); Britt v. Superior Court, 58 Cal.2d 469, 374 P.2d 817. See 7 Am.Jur.2d Attorneys at Law § 45. See the dissenting opinion of Justice Black in Cohen v. Hurley, 366 U.S. 117, at 145-148, 81 S.Ct. 954, 6 L.Ed.2d 574, subsequently adopted in Spevak v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 574. See also, United States v. Coplon, 2 Cir., 185 F.2d 629, at page 638, and Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929.

Here, Respondent was not convicted of a felony in a state court, although he was convicted of violating an ordinance in a municipal court. Thus, in the present case, Respondent was not convicted of committing a crime against the state of the class per se deemed indicative of the actor's failure to possess the ability and character necessary to meet the standards of professional responsibility and conduct commensurate with the office of attorney. In reinstatement proceedings, if opposed by The Bar, it would appear necessary for it to show a substantial nexus between the nature or circumstances of Respondent's conduct and his likelihood or tendency to continue to substandardly perform the professional responsibilities of an attorney to the degree that he is deemed totally unfit to resume practice of law.

The present record contains no evidence—scientific, medical, pathological or otherwise—suggesting homosexual behavior among consenting adults is so indicative of character baseness as to warrant a condemnation per se of a

participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of The Bar. Consequently, the present case leaves this issue unresolved by appropriate findings based on competent evidence.

The circumstances and notoriety of the Respondent's isolated act in its commission, although deemed grave enough to merit initial condemnation and disbarment, does not appear to warrant imposition of permanent disbarment in the absence of a showing of Respondent's permanent unfitness to resume law practice. Here, the homosexual act occurred in a partially partitioned public toilet stall. It was committed only in the known presence of the other participant of the act and, of course, also in the surreptitious presence of the policeman who viewed the act from a point of concealment. Evidence of antisocial behavior ferreted by peeping has never enjoyed widespread legal approval. Compare Britt v. Superior Court, supra.

I acknowledge that circumstances surrounding an act of this sort may be such as to reasonably suggest that a participant's desire for homosexual gratification may exceed his ability to demonstrate a public respect and appreciation of existing societal morals and values. In such instances it possibly may be shown by competent evidence that the participant is so propelled toward deviate sexual behavior that he is incapable of entertaining and manifesting that degree of respect and conscious awareness of public morals and public decency necessary to perform the professional responsibilities required of an attorney. But such permanent unfitness ought to be established by competent substantial evidence in the record of a respondent's case if he is to be denied reinstatement.

Since it is held in Florida that The Bar has jurisdiction to discipline Florida Bar members concerning their personal or private morals, it would appear appropriate to require that such discipline be subject to a showing originally or when reinstatement is sought that there is a substantial connection between a member's antisocial behavior and his ability to otherwise carry out his professional responsibilities as an attorney. Otherwise, The Bar will be virtually unfettered in its power to censor the private morals of Florida Bar members, regardless of any nexus between the behavior and the ability to responsibly perform as an attorney. Governmental regulation in the area of private morality is generally considered anachronistic in the absence of a clear and convincing showing there is a substantial connection between the private acts regulated and public interests and welfare. See cases hereinbefore cited.

The foregoing considered, it appears to me The Bar should be concerned, when and if Respondent applies for reinstatement, with the pathological nature of his behavioral maladjustment and his ability for successful rehabilitation, and whether his problem reasonably militates permanently against his resuming the responsible practice of law.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1970

MONDAY, MARCH 30, A.D. 1970

CASE NO. 38,694

THE FLORIDA BAR,

Complainant

-vs-

RONALD E. KAY,

Respondent

On consideration of the Petition for Rehearing filed by Attorneys for Respondent,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:
SID J. WHITE
CLERK SUPREME COURT

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1970

MONDAY, MARCH 30, 1970

CASE NO. 38,694

THE FLORIDA BAR,

Complainant,

vs.

RONALD E. KAY,

Respondent.

Respondent's motion to stay is hereby granted and proceedings in this Court are hereby stayed to and including May 29, 1970, to enable respondent to seek review in the Supreme Court of the United States and obtain any further stay from that court.

A True Copy
TEST:
SID J. WHITE
Sid J. White
Clerk Supreme Court.

cc: Honorable Louis M. Jepeway, Jr.
Honorable Marshall R. Cassedy
Honorable M. Daniel Futch, Jr.

APPENDIX D

RULE 11.02(3)(a) of Article XI of the Integration Rule of The Florida Bar reads as follows:

The standards of professional conduct to be observed by members of the Bar are not limited to the observance of rules and avoidance of prohibitive acts, in the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct to be construed as tolerance thereof. The commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline.